UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES
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Ex parte   EDWARD J. PETRUS
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Appeal No. 2006-1276
Application No. 09/444,660

MAILED

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U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

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ON BRIEF
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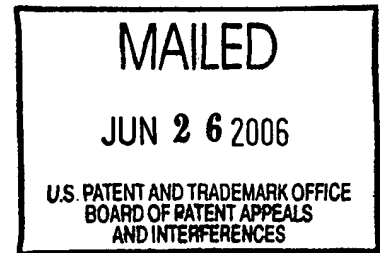Before McQUADE, MARTIN, and BARRETT, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Edward J. Petrus appeals from the final rejection (mailed December 22, 2004) of claims 1-5, all of the claims pending in the application.[1]

This is the second appeal to this Board involving the instant application. A decision in the first appeal (Appeal No. 2003-2002) issued on July 21, 2004.

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[1] Claim 1 has been amended subsequent to final rejection.

THE INVENTION

The invention relates to a method or process for creating a dietary supplement profile for an individual. Representative claim 1 reads as follows:

1. A method/process of creating a dietary supplement profile for an individual comprising:

a) completing a health questionnaire by an individual,

b) comparing of the questionnaire information by an individual to a health profile for a person of the individual's age and health history background in a computer data base,

c) comparing the individual's health information to standardized profiles based on age, sex, physical activity, dietary habits, past medical history to achieve optimal health and wellness,

d) generating a computer-implemented dietary supplement profile based on the individual's health information listing the vitamins, minerals, amino acids, enzymes, and herbs to achieve optimal health and wellness.[2]

THE PRIOR ART

The references relied on by the examiner as evidence of obviousness are:

Summerell et al. (Summerell)	5,937,387	Aug. 10, 1999
Riley	5,976,568	Nov. 02, 1999

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[2] Reading claim 1 in light of the underlying specification, we understand the comparing step recited in clause c) to further define the comparing step recited in clause b). We also understand the term "optimal health and wellness" as it appears in claim 1 as having a relatively broad meaning consistent with the statement in the specification that "[o]ptimal health is not the absence of disease but a positive state of mental and physical well-being" (page 2).

THE REJECTIONS

Claims 1-5 stand rejected under 35 U.S.C. § 112, first paragraph, as being based on a specification that fails to comply with the written description requirement.

Claims 1-5 also stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Summerell in view of Riley.

Attention is directed to the main and reply briefs (filed November 11, 2005 and December 30, 2005) and answer (mailed December 9, 2005) for the respective positions of the appellant and examiner regarding the merits of these rejections.[3]

DISCUSSION

I. The 35 U.S.C. § 112, first paragraph (written description), rejection

The test for determining compliance with the written description requirement of § 112, ¶ 1, is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject

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[3] In the final rejection, claims 1-5 also stood rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. The examiner has since withdrawn this rejection (see the papers mailed March 9, 2005 and July 29, 2005) in light of the amendment of claim 1 subsequent to final rejection.

matter, rather than the presence or absence of literal

support in the specification for the claim language. <u>In re</u>

<u>Kaslow</u>, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir.

1983).

The examiner's explanation of the rejection (see pages

5 and 6 in the answer) alleges that the appellant's

specification lacks written descriptive support for the

limitations in independent claim 1 defining the comparing

step in clause c) and the generating step in clause d) in

terms of the achievement of "optimal health and wellness."

According to the examiner,

> the original disclosure does not contain
> sufficient description and detail to allow one of
> ordinary skill in the art to understand whether
> or not the Appellant had possession of an
> invention that compares individual health
> information to standardized profiles in a manner
> which achieves *optimal health and wellness* or
> that the claimed invention generates a dietary
> supplement profile that achieves *optimal health
> and wellness*.
>   Claims 2-5 inherit the deficiencies of claim
> 1 through dependency and are also rejected
> [answer, pages 5 and 6].

The original disclosure in the instant application

makes it abundantly clear that the object of the

appellant's invention is to create a dietary supplement

profile that allows an individual to achieve optimal health

and wellness. For example, the original specification at

page 2 states that "a dietary supplement profile 3 can be generated . . . to achieve optimal health and wellness." Similarly, original claims 1 and 6 recited a method or process comprising "the generation of a dietary supplement profile . . . for optimal health and wellness," and the original Abstract summarized the invention as relating to a method and process "for calculating a dietary supplement profile . . . to obtain optimal health and wellness." Fairly read, these statements indicate that each of the constituent steps of the method or process disclosed by the appellant plays a role in the achievement of optimal health and wellness. Thus, the disclosure of the application as originally filed would reasonably convey to the artisan that the appellant had possession at that time of a method/process embodying steps as recited in clauses c) and d) of claim 1 to achieve "optimal health and wellness."

Therefore, we shall not sustain the standing 35 U.S.C. § 112, first paragraph, rejection of independent claim 1 and dependent claims 2-5 as being based on a specification that fails to comply with the written description requirement.

II. The 35 U.S.C. § 103(a) rejection

Summerell, the examiner's primary reference, discloses a system and method for using personal health information to calculate an individual's "physiological age," which is indicative of wellness or health, and to create a customized wellness plan for the individual. Summerell defines "physiological age" as "the calender [sic] age of an average person of the same gender with a comparable risk stratification level" (column 11, lines 25-27).

The system, which is computer-based (see column 7, line 48, through column 8, line 29), utilizes a personal profile questionnaire for the input of relevant data including "age, life style, habit/environment, medical and genetic information about a user" (column 8, lines 53-55). Examples of such information include:

> accident prone behaviors, age of death of
> parents, air pollution, alcohol, allergies,
> angioplasty, aspirin, asthma, blood pressure,
> body mass index, breakfast, coronary artery
> bypass graph, calcium, cigarette smoking,
> diabetes, dietary cholesterol, dietary fiber,
> driving while intoxicated, eating between meals,
> education level of spouse, education status,
> employment status, estrogen, forced expiratory
> volume in one second, firearms, first myocardial
> infarction, folate, functional status, garlic
> powder, genetic makeup, genetic risks, green tea,
> HDL cholesterol, heart rate, helmet use,
> immunizations, income, iron, job strain, liver
> disease, low back pain, lycopene, major life
> events, marital status, meat eating, coronary

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artery disease, medication compliance, medication
use, non-steroidal anti-inflammatory drugs,
occupation, parent's divorce, passive smoking
exposure, pets, physical activities, renal
disease, safety belt use, self reported health
status, sleep, social contacts, stamina,
strength, stress, stroke, suicide attempt, total
cholesterol, traffic tickets, transfusions,
vitamin A, B vitamins, vitamin C, vitamin D,
vitamin E, white blood cell count, weight
changes, zinc, and weight cycling, among others
[column 9, lines 40-61].

In addition to information supplied by an individual,

the system can utilize data, including test results,

provided by a physician (see column 5, lines 60-67).

The system employs the information to calculate a

user-specific survival probability rate (i.e., a personal

profile value) and compares it to "the average survival

probability rate of individuals of the same gender to

determine the physiological age" (column 11, lines 19-21).

In other words, the system compares the user-specific value

to reference values for specific age groups to identify the

closest reference value and hence the "physiological age"

of the user (see column 5, lines 30-37).

The system also employs the information to generate

user-specific wellness programs pertaining to, among other

things, exercise, diet and/or weight management (see, for

example, column 4, lines 58-64; column 5, lines 28-30; and

Figures 17-29). The dietary recommendations include

suggested doses of different vitamins.

The examiner's § 103(a) rejection rests on a finding

(see page 7 in the answer) that Summerell teaches a method

responsive to the limitation in claim 1 requiring

"comparing of the questionnaire information by an

individual to a health profile for a person of the

individual's age and health history background." To

support this finding, the examiner points to Summerell's

disclosure at column 8, lines 30-41, column 8, line 53,

through column 9, line 14, and column 11, lines 18-29.

These three passages read as follows:

> FIG. 1 sets forth the opening interface
> processes of the present invention. Upon
> accessing the present invention, the user 100 is
> presented with opening interface 102. At this
> point, the user can choose whether to learn more
> about the program through sales and demonstration
> 104, or begin the program 106. If the user is a
> current subscriber, the subscription is
> authenticated 108. If the user is not a current
> subscriber, the user is registered by initiating
> or renewing subscription 110, and payment is
> processed 112. After completion of subscription
> authentication 108 or subscription registration
> 110, the program proceeds to longevity metric
> high-level processes 114 [column 8, lines 30-41];

> Personal profile characteristics include
> age, life style, habit/environment, medical and
> genetic information about a user. Personal
> profile characteristics are used to stratify a
> user into a correct relative probability group,
> personalize recommendations and educators, and

provide information to system and business functions. In cases where the user knows the answer to a personal profile characteristic, he or she can directly enter the information. In some cases where a user does not know the answer to a personal profile characteristic, the user can answer a series of questions related to the personal profile characteristic in question, and the answer can be derived by the system; that is, the system can manipulate the input data into transformed data. For example, while the user might not know the number of kilocalories expended each week during exercise, by inputting the frequency, duration and intensity of the physical activities, the system can then determine the kilocalories expended using techniques known in the art. Personal profile characteristic business processes then perform operations on the user's answers to determine a personal profile characteristic value. Some business processes supported by personal profile characteristics are as follows: the personal profile characteristic can perform a calculation on user-entered numerical answers to derive a personal profile characteristic value; or the personal profile characteristic can evaluate user-entered data against conditional rules which point to an associated value. After the rules have been evaluated, the personal profile characteristic summarizes the values for each true rule into a composite score [column 8, line 53, through column 9, line 14];

and

. . . This user-specific probability rate is then compared to the average survival probability rate of individuals of the same gender to determine the physiological age. Thus, the physiological age is equal to the chronologic age at which the user's survival probability rate equals the average survival probability rate of an individual of the same gender. Stated in another way, a user's physiological age is equal to the calender [sic] age of an average person of the same gender with a comparable risk

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stratification level. Thus, a user's
physiological age is a metric; that is, it is a
meaningful number used to measure wellness
[column 11, lines 18-29].

The first passage, which deals with the initial steps

taken by an individual to access Summerell's program, has

little, if any, relevance to the matter at hand.

The second and third passages, while more relevant

than the first, do not support the examiner's position.

These passages detail how Summerell uses personal profile

characteristics to arrive at a personal profile value or

survival probability rate which is compared to other such

values or rates to determine physiological age. This

procedure does not amount to a step of comparing an

individual's questionnaire information to a health profile

for a person of the individual's age and health history

background as recited in claim 1. Thus, the examiner's

conclusion of obviousness stems from an unsupported, and

therefore faulty, factual finding regarding the teachings

of Summerell. This flaw in the examiner's analysis finds

no cure in any other portion of the Summerell disclosure or

in Riley's disclosure of a modular system of vitamin and

mineral supplementation.

Consequently, the combined teachings of Summerell and

Riley do not justify the examiner's conclusion that the

differences between the subject matter recited in claim 1
and the prior art are such that the subject matter as a
whole would have been obvious at the time the invention was
made to a person having ordinary skill in the art.
Accordingly, we shall not sustain the standing 35 U.S.C.
§ 103(a) rejection of independent claim 1 and dependent
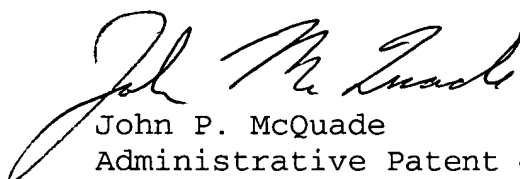claims 2-5 as being unpatentable over Summerell in view of
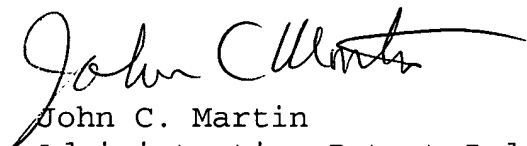Riley.

SUMMARY

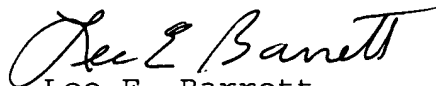The decision of the examiner to reject claims 1-5 is
reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

REVERSED

John P. McQuade   )
Administrative Patent Judge   )
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)
) BOARD OF PATENT
John C. Martin   )
Administrative Patent Judge   )   APPEALS AND
)
) INTERFERENCES
)
Lee E. Barrett   )
Administrative Patent Judge   )

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